

**SECTION 11.15 RIGHT OF REPRESENTATION AT EMPLOYEE MEETINGS WITH MANAGEMENT:
GUIDELINES FOR SUPERVISORS
Last Review: 6/11**

Background:

The United States Supreme Court in *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959, L.ED.2d 171 (1974), set forth an employee's right to union representation during employer-conducted investigatory interviews. This right emanates from Section 8(a)(1) of the National Labor Relations Act (NLRA). The Court reasoned that to deny union assistance at an investigatory interview is "to interfere with, restrain or coerce an employee" in the exercise of the individual right of the employee, protected by Section 7, "to engage in ... concerted activities for ... mutual aid or protection..." The Court's holding in *Weingarten* has become known as the "*Weingarten* right."

The NLRA covers private employers and employees only. Because, however, Section 10.2 of the Iowa Public Employment Relations Act (IPERA) is identical in language with Section 8(a)(1) of the NLRA, the Public Employment Relations Board (PERB) adopted *Weingarten* and made the *Weingarten* right applicable to Iowa public employees in *McCormack v. City of Cedar Falls*, 80 PERB 1511 (1980).

Guidelines:

1. The triggering of the *Weingarten* right
 - a. Three prerequisites must exist:
 - (1) The employee has requested the presence/assistance of a union representative.
 - (2) The meeting with the employee is an investigatory interview.
 - (a) The purpose of the meeting must be to investigate the alleged misconduct of the employee, rather than to discuss work performance. The right of representation at meetings with management does not apply to normal employer-employee conversations, such as the giving of instructions, assignments, training, or needed correction of work techniques, performance reviews, etc. Should the employee in these situations request a union representative, the supervisor is to explain that the *Weingarten* right does not apply. Refusal to continue the meeting without union representation is tantamount to insubordination. The employee must be informed that he/she must participate; that refusal to participate will be considered insubordination, and that insubordination will lead to disciplinary action. While the right to representation does not attach to meetings to discuss performance evaluations, prior to issuing discipline for performance problems or following a less than satisfactory review, an investigatory meeting should be held with the employee to discuss the problem and consequences. The employee has the right to request representation for the meeting.
 - (b) Employees do not have a right to union representation at meetings where discipline is to be announced. Management has completed its investigation and determined the discipline to be imposed. The employee is merely being given notice of a predetermined action. There must be no further questioning of the employee regarding the circumstances that led to discipline.
 - (3) The employee reasonably believes that the interview might result in the imposition of discipline either immediately or in the reasonably near future.
 - (a) The right to union representation arises when the employee has a reasonable basis to believe that discipline may result because of the information given during the interview.

An employee need not be the subject of the investigation in order to exercise the right to union representation. Thus, while management's intended purpose of the meeting may be otherwise, it is the employee's perception of the purpose of the meeting that is relevant. The employee may come to this conclusion before or during the meeting.

- (b) Some factors that have been considered relevant when determining the reasonableness of the employee's belief that discipline may result from the interview are:
 - (i) Is it possible that statements or admissions made by the employee would be used in subsequent actions?
 - (ii) Has the employee been disciplined before, causing an expectation of additional discipline?
 - (iii) Where is the interview taking place? (Some employers have certain areas used for limited purposes, such as investigating alleged employee misconduct.)
 - (iv) How has the employer characterized the action? (If the employer has a rule that unexcused absences will result in discipline and the employer conducts an interview concerning the employee's absences, the employee may reasonably infer that discipline may result from the interview.)
- (c) Grant an employee's request for union representation during an investigatory interview which the employee reasonably believes might result in the imposition of discipline.
 - (i) Although not required by the *Weingarten* case, DAS-HRE has determined that the principles of just cause, the requirements of *Loudermill* (a U.S. S. Ct. decision which requires due process before a public employee may be deprived of the employee's property interest in continued public employment), and progressive employment practices mandate that an employee's request for representation during a *Loudermill* meeting be granted.
 - (ii) The employer will call in a union representative at the employee's request. If a union representative attempts to thwart an interview, the employer may find it necessary to offer the employee the choice of continuing the interview without union representation or not having any interview. (For further guidance, see sections 2 and 3 below.)

2. Procedure for granting an employee's request for a union representative

- a. The *Weingarten* right does not start until the interview begins.
- b. The *Weingarten* right includes only the right to have a union representative (a union steward or elected or appointed union official) present, not the employee's private attorney or a coworker (even if the coworker is a union member; see UE/IUP exception in subsection "e" below).
- c. If the employee requests a particular union representative, allow the employee to have that particular representative present if immediately available. If the particular representative requested by the employee is not immediately available, the employee must utilize the union representative on duty and available.
- d. If no union representative is immediately available, the employer will allow a union representative to be called in, and the following guidelines are recommended:
 - (1) If the union representative is within the local area, the representative is expected to arrive as soon as possible (within thirty (30) minutes), depending upon the circumstances involved.

- (2) If the union representative is not located within the local area, but within fifty (50) miles, the representative is expected to arrive within ninety (90) minutes, otherwise, the employer may proceed with the investigatory interview.
- e. Whenever possible, the employer should schedule an investigatory interview with the employee when there is a union representative available. This will avoid the problem of having to wait for the arrival of a union representative from some other location.

Exception: The IUP collective bargaining agreement provides language slightly different than described in subsection “d” above:

- (1) The right to have a steward present shall expire if no steward is available within two (2) hours of the request for the meeting. The meeting may be held without the steward present.
- (2) Representation may be provided by telephone within two (2) hours if the representative cannot be personally available.
- (3) The employee may have an IUP contract covered coworker present if a steward is unavailable.

3. The investigatory meeting – questions and the role of the representative

- a. When the investigatory interview is delayed in order to grant the employee’s request to bring in a union representative, the employee has the right to consult with the union representative prior to the interview. The employee also has the right to be informed of the nature of the investigation. The consultation between the employee and the union representative need be nothing more than an opportunity for the representative to become familiar with the employee’s circumstances, that is, a meeting lasting no more than five (5) – ten (10) minutes. Management does not have to review its case, the information it has obtained, or the specifics of the alleged misconduct to be discussed. A general statement identifying the misconduct or problem will suffice.
- b. Questions asked during the investigatory interview must be directed to and answered by the employee, not the union representative. An employee may be required to answer a job-related question after having been advised that the information given under the threat of discipline may not be used against the employee in a present or future criminal proceeding. This is known as the “*Garrity* warning.”

The State has agreed with AFSCME that *Garrity* will only be invoked at the time an employee refuses to answer a question in an investigatory interview.

At the time an employee refuses to answer a question, the employee must be told:

- (1) That the employee is being directed to respond to all questions, completely and truthfully.
- (2) That failure to respond to the questions completely and truthfully is considered insubordination and may lead to disciplinary action.
- (3) That any responses that the employee is directed to provide under threat of discipline cannot be used against the employee in a criminal proceeding.
- c. The role of the union representative is that of an observer on behalf of the employee. The union representative ensures that the rights of the employee are not abridged. There is no obligation for the employer to bargain with the representative or respond to questions posed by the representative or employee. The employer, however, cannot refuse to allow the representative to speak. In listening to the employee’s version of the incident under investigation,

the supervisor is required to allow the union representative to assist the employee in presenting the facts. This does not give the union representative the right to interfere with or obstruct the investigation. The employee can properly be directed to personally respond to the employer's job-related questions after being given the *Garrity* warning, if appropriate.

- d. If the union representative becomes disruptive, advise the employee that the interview will cease and a decision will be made without the benefit of the employee's side of the story or, if agreeable with the employee, the interview will continue without the union representative present.
- e. The union representative should be given an opportunity to comment on the matter under investigation prior to the conclusion of the interview.

4. Necessity for documentation during the investigatory interview

- a. Detailed notes should be kept on:

- (1) Who was present?
- (2) Where the interview took place.
- (3) The beginning and ending time of the interview(s).
- (4) Who said what – quoting the participants as verbatim as possible.
- (5) The events leading up to the interview.

Often, the participant will later disagree concerning the substance of the interview. Generally, the party with contemporaneous notes is considered the most credible.

Allowing the employee who is the subject of the investigation to present his or her side of the story should not adversely affect the investigation. Instead, many times the employee will either admit the allegation or offer a sufficient explanation which refutes the allegation and which management can investigate further.

- b. The application of the *Weingarten* right

To avoid later questions regarding the application of the *Weingarten* right, as part of the information gathered above, document specific facts concerning the granting of the *Weingarten* right. Include in this report detailed facts, particularly if a union representative was unavailable, or the interview was discontinued or continued without the union representative because the union representative became disruptive.

5. Change in the nature of a non-investigatory meeting

- a. If the employer-employee meeting starts off as a non-investigatory meeting, keep in mind that the nature of the meeting can change if the supervisor begins to question the employee regarding the employee's conduct.
- b. If the character of the meeting changes to an investigatory interview, the employee must request union representation to invoke his/her *Weingarten* right. However, if the employee requested the assistance of a union representative at the start of the meeting and was denied the same because the meeting was intended to be non-investigatory, the employer will not require a second request. The employer will simply ask the employee if the employee now desires the presence of a union representative.

6. Extension of the *Weingarten* right to noncontract-covered employees

- a. Although not required to do so (DAS-HRE rules are silent on the issues discussed above), these guidelines, as modified in sub-paragraph “b” below, are to be followed for noncontract-covered employees as a non-binding progressive employment practice.
- b. Employees who are not represented by a union may be granted, upon request, the presence of a noncontract-covered coworker during an employer-conducted investigatory interview which the employee reasonably believes might result in disciplinary action (either immediate or in the reasonably near future). An employee's request for a person who is a union representative or who is a member of a bargaining unit will not be granted.